FEDERAL INSURANCE CO.

v.

NAKANO SINGAPORE PTE. LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
CHAN SEK KEONG J
WARREN LH KHOO J
[CIVIL APPEAL NO. 109 OF 1990]
30 DECEMBER 1991

CONTRACT: *Building contract - Collapsing scaffolding - Failure to take precautions - Whether claim time-barred by the General Conditions of the contract.*

INSURANCE: *Public liability policy - Whether insured had breached conditions of the policy - Workmen's compensation policy.*

CIVIL PROCEDURE: *Notice for further directions - Determination of a preliminary issue - Circumstance under which a Court will exercise its power - Rules of the Supreme Court O. 33 r. 2*

Sanpete (contractors) had taken out a public liability policy with the appellants in respect of construction works in Chinatown Centrepoint. On September 5 1985, an accident occurred, resulting in loss of life, personal injury and damage to property. On the following day, Sanpete notified the appellants, whereupon the appellants appointed GM (loss adjusters) to assess the loss. However, by 2 May 1986, Sanpete had not submitted details of their losses to the appellants; neither had the respondents (subcontractors) done so. On 15 August 1986, the details were provided to GM by Sanpete's insurance brokers. On November 4 1986, the appellants wrote to the respondents, repudiating liability on the ground that the respondents had breached the terms and conditions of the policy in that they had failed to take all reasonable precautions to prevent loss, damage or liability and to comply with statutory requirements and manufacture recommendations.

The respondents proceeded to file their claim on 29 June 1987, claiming the sum of $226,371.70. The claim was increased slightly in July 1988. In their defence, the appellants denied liability; they also counterclaimed against the respondents for $243,078 which they had paid to injured workers under a workmens's compensation policy.

In June 1988, the appellants took out a notice for further directions for an order of the Court that a preliminary issue be tried - The issue being whether the defence alleged disclosed a good defence in law to all the claims of the respondents. The main thrust of the appellants' defence is that the respondents' claim is time-barred under the General Conditions of the Contract. The application by the appellants was dismissed by the Assistant Registar, and on appeal to the Judge, it was again dismissed; hence the present appeal.

In this appeal, the appellants contended that the Judge erred in law in holding that a preliminary issue to be tried could only be made in a case which would, when decided one way or the other, be likely to dispose of the action. A second ground of appeal was that the Judge was wrong in holding that an order for a preliminary point to be tried ought not be made when there are facts in dispute. The third ground of appeal was that the preliminary point raised by the appellants was concerned only with the construction of the conditions of the policy and the appellants' letter of repudiation.

Held:

[1] As a general rule, the Court will not exercise its power under O. 33 r. 2 to order a preliminary point of law to be tried unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole. It is a matter of discretion for the Court to exercise in the circumstances of each case bearing in mind that "preliminary points of law too often are treacherous short cuts."

[2] It is true that if the preliminary issue were decided in the appellants' favour, they would not have to prove their other defences to the claim. However, in this case, they had a counterclaim which was founded on the same averments of fact as the other defences. Therefore, whichever way the preliminary issue went, the counterclaim still had to be tried. This meant that relatively little time or expense would have been saved by an order to try the preliminary issue first.

[Appeal dismissed.]

Cases referred to:

Everett v. Ribbands [1952] 2 QB 198 ***(cit)***
Carl Zeiss Stiftung v. Herbert Smith [1969] 1 Ch 93 ***(cit)***
Palaniappa Chettiar v. Sithambaram Chettiar [1982] 1 MLJ 186 ***(cit)***
Gold v. Patman & Fotheringham [1958] 2 All ER 497 ***(cit)***
Yeoman Credit Ltd. v. Latter [1961] 2 All ER 294 ***(cit)***
West Wake Price & Co. v. Ching [1956] 3 All ER 821 ***(cit)***
Boshoff v. South British Insurance Co. [1951] 3 TPD 481 ***(cit)***

Legislation referred to:

Rules of the Supreme Court [Sing], O. 33 r. 2

Other source referred to:

Atkin's Court Forms, Vol. 23, 1988

For the appellants - NK Pillai; M/s. Harry Elias & Co.
For the respondents - Kelvin Chia; M/s. Chor Pee & Co.

JUDGMENT

Yong Pung How CJ:

On 5 September 1985, the scaffolding at the construction site of the building called Chinatown Centrepoint collapsed causing loss of life, personal injury and damage to property. The construction works were insured under a public liability policy issued by the appellants in the names of the developers as principal, Sanpete Builders (S) Pte. Ltd. (Sanpete) as contractor, their consultants and sub-contractors (including the respondents), for their respective rights and interests.

On 6 September 1985, Sanpete notified the appellants of the accident. On the same day, the appellants appointed their loss adjusters, Graham Miller (Singapore) Pte. Ltd (GM), to assess the losses. It would appear that at the outset, it was agreed between all the affected parties that Sanpete would co-ordinate all aspects of the claim documentation.

Up to 2 May 1986, Sanpete had not submitted details of their losses to the appellants. Neither had the respondents submitted details of their losses to Sanpete. On 15 August 1986, Sanpete sent a letter to their insurance brokers, Sale-Tilney Wong (ST-W), a break down of their claim totalling $503,037.61 under the policy, together with supporting documents. It has been

alleged by GM that on 21 August 1986 ST-W passed to them the said letter and the supporting documents. It was also the appellants' case that Sanpete's claim included the whole or part of the respondents' claim.

On 4 November 1986, the appellants wrote to the respondents and repudiated liability under the policy on the ground that the respondents had breached the terms and conditions of the policy in that they had failed to take all reasonable precautions to prevent loss, damage or liability and to comply with statutory requirements and manufacturers' recommendations.

The respondents ignored the purported repudiation. On 26 June 1987, they, through their solicitors, submitted in writing a claim for $226,371.70. On 29 June 1987, the respondents commenced this action to claim a loss to property in the amount of $226,371.70. On 30 June 1987, the appellants' solicitors replied to the letter of 26 June 1987 to reiterate their clients' stand that they had repudiated liability on 4 November 1986. The respondents' claim was increased to $227,072.54 on 23 July 1988.

The appellants filed their defence and counterclaim on 24 July 1987 and pleaded, in defence to the claim, that the respondents had (i) breached condition 3 of the policy in failing to take reasonable precautions to prevent loss, damage or liability at the work site and to comply with statutory requirements under the Factories Act 1973, and The Factories (Building Operations and Works of Engineering Construction) Regulations 1985, and (ii) failed to commence the action within 3 months as required under condition 8 of the policy. The appellants also counterclaimed against the respondents in the amount of $243,078 which they had paid to injured workers under a workmen's compensation policy issued by them on the grounds, *inter alia,* that the respondents had also breached the terms of the said policy. The defence and counterclaim was amended on 29 January 1987.

On 2 June 1988, the appellants took out a notice for further Directions for an order of Court that a preliminary issue be tried, the issue being:

> whether upon the facts pleaded in paras. 8 and 9 of the ,amended defence and counterclaim, the defence alleged therein disclosed a good defence in law to all the claims and causes of action pleaded by the respondents in the statement of claim.

Paras. 8 and 9 read:

> 8. Further or in the alternative, the defendants say that they are not liable to the plaintiffs as the plaintiffs' claim herein is time-barred under Condition 8 of the General Conditions. Condition 8 provides as follows:
>
> > 8. If a claim is in any respect fraudulent, or if any false declaration is made or used in support thereof, or if any fraudulent means or devices are used by the insured or anyone acting on his behalf to obtain any benefit under this policy, or **if a claim is made and rejected** and no action or suit is commenced within three months after such rejection or, in case of arbitration taking place as provided herein, within three months after the Arbitrator or Arbitrators or Umpire have made their award, all benefit under this policy shall be forfeited.
> > (Emphasis added)
>
> 9. The Plaintiffs' claim herein was rejected by the defendants in their letter addressed to the plaintiffs dated 4 November 1986. No action or suit including this action was commenced by the plaintiffs within 3 months after the date of the said rejection. By reason thereof the plaintiffs have lost all benefit under the said policy and the defendants are thereby not liable to the plaintiffs for their claim herein.

The application was supported by an affidavit from the appellants' solicitor, the material portions of which read:

> 7. The preliminary issue raises a crucial defence for the defendants. If found favourable, the preliminary issue will determine decisively this action and in my respectful view, this is an appropriate matter to be tried as a preliminary issue in view of the saving in time and costs. It is also my respectful and humble view that there are no questions of fact which must be first determined before the consideration of the preliminary issue. The plaintiffs in para. 7 of their reply and defence to counterclaim admit that the defendants sent the said letter referred to hereinabove.
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> 8. All the other defences will involve consideration of documentary and/or oral testimony of various witnesses. The full trial involving consideration of these matters over and above the simple preliminary issue will involve the defendants in a large amount of expense and preparation which would be totally unnecessary if the question, as framed, in the preliminary issue is found in favour of the defendants.

The respondents filed an affidavit in which they listed the following disputes of fact and law:

(1) when the respondents made their claim under the policy;
(2) when the appellants rejected the respondents' claim;
(3) the construction to be placed on the appellants' letter of repudiation dated 4 November 1986;
(4) the construction to be placed on condition 8 of the policy; and
(5) whether condition 8 was void as a penalty clause. In our view, only issues (1) and (4) were material to the respondents' case.

The application was heard and dismissed by an Assistant Registrar. The appellants appealed to the Judge who, in dismissing the appeal, said:

> Generally speaking, the kind of case in which an order of this sort can usefully be made is one in which the matter directed to be tried first will, when decided one way or the other, really likely to dispose of the case. The order for the trial of a preliminary point of law should not be made where there are facts in dispute.
>
> In the present case, there are substantial disputes of facts involved which must first be determined even before the issue of law arises.

The appellants appealed to this Court. Their first ground of appeal was that the Judge erred in law in holding that a preliminary issue to be tried could only be made in a case which would, when decided one way or the other, be likely to dispose of the action. Counsel for the appellants submitted that the correct approach was set out in the following passage from the judgment of Romer LJ in *Everett v. Ribbands* [1952] 2 QB 198, at p. 206:

> I think where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly after the close of pleadings.

Romer LJ's statement of practice was upheld by the Court of Appeal in *Carl Zeiss Stiftung v. Herbert Smith* [1969] 1 Ch 93. The Court disapproved of dicta in previous decisions that a preliminary issue should be ordered only when, whichever way it was decided, it was conclusive of the issue.

We are unable to agree with Counsel's criticism of the way Chua J stated the general practice of the Courts. That statement was lifted from *Atkin's Court Forms*, Vol. 23, 1988 issue, at p. 138. It sets out the general practice of the Courts and emphasises the discretionary element

in the making of any such orders. It does not conflict with the statement of Romer LJ in *Everett.* Moreover, it is clear from the grounds of decision given by Chua J that in applying the general principle, he had regard to the important factor that there were substantial disputes of fact to be determined before the preliminary point could be decided.

The second ground of appeal was that the Judge was wrong in holding that an order for a preliminary point to be tried ought not be made when there are facts in dispute. Counsel pointed out that the Court had the power to do so even though the facts might be in dispute. He referred to O. 33 r. 2 of the Rules of the Supreme Court and also *Everett* and *Carl Zeiss.*

This ground has to be considered together with the other grounds of appeal. But, we make the following observations with respect to it. Firstly, it was a departure from the original basis of the application, which was that there were no issues of fact to be determined. Secondly, in both *Everett* and *Carl Zeiss* the preliminary points of law did not involve any prior determination of disputes of fact. In *Everett,* E had claimed damages against R for malicious prosecution. The preliminary point was raised and decided at the trial of the action. Devlin J ruled that for such an action to proceed it was essential for E to aver that the proceedings complained of terminated in E's favour, and since they had not, E had no cause of action. The Court of Appeal affirmed the decision. Similarly in *Carl Zeiss,* the preliminary point was also one of law, the facts having been assumed either way. In that case, CZ of East Germany claimed an account and other reliefs against HS, solicitors who had acted for CZ of West Germany in a passing-off action by CZ(EG) against CZ(WG). HS had received moneys from CZ(WG) in respect of fees, costs and disbursements in defending the passing off action which was still pending in which CZ(EG) claimed, as HS admittedly knew, that all the assets of CZ(WG) were and always had been the property of CZ(EG). In the action against HS, CZ(EG) averred matters which were in issue in the passing-off action. HS moved for an order for trial of a preliminary issue of the question whether they would be accountable to CZ(EG) for the moneys admittedly received, **if CZ (EG) established the matters averred.** The Court of Appeal allowed the application on the ground that it was an exceptional situation where the solicitors had to be satisfied, before they continued to act for CZ(WG) in the action, whether they were entitled to retain such moneys for services rendered.

Thirdly, we are in full agreement with Counsel with respect to the powers of the Court under O. 33 r. 2 of the Rules of the Supreme Court. That Rule expressly provides that the Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause of matter. It would be contrary to the express terms of that rule for a Court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law. An action may involve many disputes on the facts as well as on the law, some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.

In *Everett,* Romer J began his judgment by stating that the point of law before the Court should have been set down as a preliminary point before the hearing as the action was a substantial one and estimated to last three days. Similarly in *Palaniappa Chettiar v. Sithambaram Chettiar* [1982] 1 MLJ 186, the Judge adopted the same approach. In that case, there was a dispute amongst the children of the deceased with regard to the validity of his will. PC, a named beneficiary, applied for probate in July 1969, in Malaysia. SC, a disherited son, commenced an action in September 1969, in India against PC and other beneficiaries

under the will in connection with the properties of the deceased in India as well as in Malaysia. The action was settled in June 1972, by a consent order under which SC was given a share in the deceased's estate. In 1976, PC brought another action to have the consent order declared null and void. The action was dismissed in June 1978. PC's appeal to the High Court of Madras was also dismissed. SC then applied in the Malaysian action for an order that a preliminary issue as to whether PC was estopped *per rem judicatam* from contending that the will was valid, or applying for probate, be tried. The Judge allowed the application on the ground that if the point was res judicata, then it would not be necessary to try the other issues, that is, the deceased's capacity to execute the will, his sanity and undue influence, thus avoiding the necessity of having to obtain evidence from India on those issues, which could be expensive and time-consuming. On appeal, the Federal Court refused to interfere with the Judge's decision having regard to the background of the case.

The third ground of appeal was that the preliminary point raised by the appellants was concerned only with the construction of condition 8 of the policy and of the appellants' letter of repudiation. He referred us to *Gold v. Pathman & Fotheringham* [1958] 2 All ER 497 and *Yeoman Credit Ltd. v. Latter* [1961] 2 All ER 294 where questions of construction of documents were held suitable for determination as preliminary points of law. We agree that questions of construction are suitable for decision as preliminary points. However, they may not be suitable if there are also disputes as to the "factual matters" affecting the point of construction: see 23 Atkin's Forms 1988. It is a question of the degree or magnitude of these preliminary factual disputes in each case.

In connection with this ground, Counsel for the appellants also contended that the disputed facts affecting the preliminary point were few and simple and could easily be decided at the trial of the preliminary issue of law. He accepted the disputed facts were (a) whether the respondents had made a claim under the policy and (b) when they made it. We should interpolate here to add that neither in the Amended Defence and Counterclaim nor in the solicitor's affidavit filed in support of the appellants' application was it ever alleged that there was a question as to **when** the respondents made a claim under the policy. What was alleged was that the respondents' claim had been rejected by the appellants on 4 November 1986. It seemed to us that the appellants had merely assumed that the respondents had made a claim at some point of time before that date. This was evident from the submission of Counsel for the appellants with regard to the meaning of the expression "claim" as used in the policy, and his affidavit that there were no questions of fact which must first be determined before the consideration of the preliminary issue.

His first submission was that the respondents made their claim on the day the appellants were notified of the accident whereupon they appointed GM to assess the claims. He contended that since GM had been appointed to assess the claims, the respondents must have made a claim. He contended that the expression "claim" was used throughout the policy with a consistent meaning and also that that meaning had been judicially defined by Devlin J in *West Wake Price & Co. v. Ching* [1956] 3 All ER 821, at p. 829, as follows:

> the primary meaning of the word "claim" - Whether used in a popular sense or in a strict legal sense - Is such as to attach it to the object that is claimed; and is not the same thing as the cause of action by which the claim may be supported or as the grounds on which it may be based.

Devlin J's definition was given in the context of whether the "claims" that had arisen in that case came within the ambit of the QC clause in the policy. It had no relevance to the issue before us, which was when the respondents first **made** a claim. Undoubtedly, a claim arose

the moment people were injured and property damaged as a result of the collapse of the scaffolding. But to assert that a claim was made as soon as Sanpete notified the appellants of the accident was to confuse the notification of the occurrence of an insured event giving rise to a claim and the making of a claim. Under condition 5 of the policy, the insured were under an obligation to notify the appellants immediately upon the happening of any event giving rise to a claim. This was what Sanpete had done in this case. It was entirely possible (but most unlikely as they would not then have known of the extent of their loss) that Sanpete could have made a claim at the same time that they notified the appellants of the accident. There was, however, no evidence before us that Sanpete did so, or that the respondents did so. It seemed to us more likely (but we make no finding on it) that GM were appointed to assess the losses as a result of claims having arisen rather than of claims having been made.

The contention of Counsel for the respondents was that the respondents did not make a claim under the policy until 26 June 1987 and that accordingly, the appellants' repudiation on 4 November 1986 had no effect. Counsel referred to *Boshoff v. South British Insurance Co.* [1951] 3 TPD 481 in support of this submission. In that case, condition 10 of a motor insurance policy provided that:

> ... in the event of the company disclaiming liability in respect of any claim and an action or suit be not commenced within three months after such disclaimer ... all benefits under this policy in respect of such claim shall be forfeited.

After an accident, the insured's attorney forwarded to the company on 12 April a third party claim in connection with the accident. On 18 May, the company's attorneys replied repudiating liability on the ground of a breach of the terms of the policy. The insured then settled the claim of the third party, issued a letter of demand on 28 July and commenced proceedings on 23 September. The Magistrate's Court dismissed the action on the ground it was time-barred. On appeal, the Transvaal Divisional Court held that the word "claim" in condition 10 meant a demand for an indemnity in a particular amount, that the insured's letter of 12 April was not a "claim" within the meaning of condition 10, and that because there was no claim to be repudiated on 18 May, the company's letter was not a letter "disclaiming liability in respect of any claim" within the meaning of the clause.

Counsel for the appellants sought to distinguish *Boshoff* on the basis that it dealt specifically with a third party claim whereas here the claim was a direct party claim. We did not think that this distinction was material. *Boshoff* decided a "claim" must contain the essential ingredient of a demand or an assertion of a particular right. In this case, condition 8 contains the words "if a claim is made". In our view, the word "made" makes it explicit and reinforces the necessity of a demand for payment. Whether, in this case, the claim is for the respondents' direct loss or indirect loss, as from a third party claim (and here the policy insured against public liability), an essential element in the "making" of a claim is the making of a demand or request, express or implied, for payment. A claim is made when a demand or request for payment is made. It is not made by a mere notification of the happening of the insured event giving rise to a claim.

Counsel for the appellants then sought to fall back on Sanpete's letter of 15 August 1986 to ST-W and which ST-W had passed on to GM. He contended that the respondents had made a claim by or through that letter. The contrary contention, by Counsel for the respondents, was that the 15 August 1986 letter was sent by Sanpete to their own agents, ST-W, that ST-W were not the respondents' agents, and that neither Sanpete nor ST-W had any authority to submit a claim on behalf of the respondents. On the face of it, the letter dated 15 August 1986 merely gave a breakdown of Sanpete's claims. It made no demand for payment.

Furthermore, apart from the issue of authority, the letter, by itself, did not evidence a claim by Sanpete on behalf of the respondents. It should be recalled that the respondents were also insured for their own interests in the works. In our view, these issues raised disputed questions of fact which had first to be resolved before the preliminary point could be tried. Chua J's finding in this respect was correct.

Taking all the points made by Counsel for the appellants, we may state as a general rule that the Court will not exercise its power under O. 33 r. 2 to order a preliminary point of law to be tried, whether or not that point involves the prior determination of factual disputes affecting that point unless the trial of that issue will result in a substantial saving of time and expenditure in respect of the trial of the action as a whole (including any counterclaim). It is a matter of discretion for the Court to exercise in the circumstances of each case, bearing in mind that:

> preliminary points of law too often are treacherous short cuts. Their price can be delay, anxiety and expense
> - (per Lord Scarman in *Tilling v. Whiteman* [1979] 2 WLR 401, at p. 410).

In *Gold v. Patman & Fotheringham*, Hodson LJ observed that if the defendant had taken the course of having the preliminary point of construction tried, a very large expenditure of money would have been saved. Likewise, in *Palaniappa Chettiar*, the Federal Court decided that the Judge applied the principle correctly. In this connection, Counsel for the appellants submitted, as his fourth ground of appeal, that Chua J was wrong in failing to take into account the considerable time and expenditure that would have been saved in having the preliminary point tried first. He pointed out that the other defences pleaded by the appellants would entail the calling of a considerable number of witnesses, including experts, to testify, and that the trial of those issues would take a good number of days. We agreed with the principle of the submission, but Counsel was unable to make good he submission in the circumstances of this case. True it was that, on our reckoning, the preliminary point and the associated facts in dispute would not have taken more than a day to try, and that the trial of the other defences would have been protracted, having regard to the evidence that needed to be adduced. True it also was that if the preliminary points were decided in favour of the appellants, they would not have to prove their other defences to the claim. But, in this case, the appellants had a counterclaim which was founded on the same averments of fact as the other defences. Therefore, whichever way the preliminary point went, the counterclaim still had to be tried. This meant that relatively little time or expense would have been saved by an order to try the preliminary issue first.

In our view, Chum J applied the correct principle and took into account the relevant considerations in exercising his discretion in dismissing the appellants' application. We agreed with him that, having regard to the circumstances, this was not a proper case for an order for the trial of a preliminary issue. The appeal was accordingly dismissed with costs.

Also found at [1992] 1 CLJ 539